No. 11,623

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE GARTNER, an Insane Person, and MIKE ERCEG, Guardian of the Estate of George Gartner, an Insane Person,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF OF APPELLANTS.

George Gartner is an insane person, so adjudged by the Probate Court for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on July 19, 1927, and ordered committed to Morningside Hospital at Portland, Oregon.

Ever since the year 1905 Congress has annually appropriated for sundry civil expenses of the government funds for the care and custody of persons legally adjudged insane in the District of Alaska including transportation and other expenses.

(NOTE): Appellants were defendants below; appellee, plaintiff. All emphasis in this brief is ours.

There was no act of Congress, during the time involved in this action, that authorized a charge to be imposed upon the insane patient, or his estate, for his care and support while confined in the hospital, under the direction of the Secretary of the Interior. This was conceded by plaintiff in the lower Court.

Plaintiff insists, however, that it is entitled to recover from Gartner or his estate, the reasonable cost of his care and maintenance, at Morningside, during the period involved, under the Common Law of Alaska.

COMPLAINT.

The complaint, after alleging that George Gartner was committed to Morningside Hospital on July 19, 1927, by the Probate Court for the Fairbanks Precinct, Fourth Division, Territory of Alaska, under the provisions of the Act of Congress of January 27, 1905 (33 Stat. 619; 48 USCA 47) and Act of February 6, 1909 (35 Stat. 601; 48 USCA 46), and the appointment of Mike Erceg as guardian of his estate, then alleges, in paragraph IV (R. 3, 4) as follows:

> "That between said 10th day of August, 1927, and the 13th day of October, 1942, both dates inclusive, the plaintiff has expended the total sum of Nine Thousand One Hundred Eighty and 11/100 Dollars ($9,180.11) for the care and maintenance of the said George Gartner at said Morningside Hospital, at Portland, Oregon; that said sum of $9,180.11 is the reasonable cost of the care and maintenance of said defendant, George

Gartner, at said hospital during the period aforesaid; and that said defendant, George Gartner, is justly indebted to the plaintiff in said sum of $9,180.11."

Then follows an allegation of demand, refusal to pay, and the usual prayer.

DEMURRER.

Defendants demurred to the complaint upon the grounds that it does not state facts sufficient to state a cause of action. (R. 5.)

The Court, in a written opinion (R. 6-20) overruled the demurrer, and this is the basis of Assignment of Error I. (R. 96.)

AMENDED ANSWER.

Defendants' amended answer after admitting the allegations of the complaint, except paragraph IV above quoted, set up the following affirmative defense (R. 22):

"That during all of the time mentioned in the Complaint, plaintiff by Congressional acts appropriated monies annually for the care and maintenance of insane persons who were adjudged to be insane, and ordered by reason thereof, to be committed to the Morningside Hospital at Portland, Oregon, by the Courts of Alaska. That said appropriations were made as a gratuity and charity and without any thought or expectation upon the part of Congress or plaintiff that any

part thereof was to be repaid to plaintiff by said insane person or his legal representative. That ever since the 'Act of May 17, 1884, providing for the Civil Government of Alaska' (23 Stats. 24), and up until the Act of Congress of October 14, 1942, (56 Stat. 782), relating to the care and maintenance of insane persons in Alaska, plaintiff never requested or made any demand, upon any insane person or his legal representative, for reimbursement for any monies that may have been expended by plaintiff for the care and maintenance of insane persons pursuant to the Acts of Congress. That by its acquiescence from the year of 1884 to the year of 1942 in said policy the plaintiff should not now be permitted to assert that monies expended by it as a gratuity and as a charity should be recovered from insane persons, their legal representatives, or relatives."

PLAINTIFF'S DEMURRER.

Plaintiff demurred to the affirmative defense upon the ground that it did not state facts sufficient to constitute a defense to the complaint (R. 25); which demurrer was sustained, and this is the basis of Assignment of Error II. (R. 96.)

COURT DIRECTED VERDICT, FOR PLAINTIFF, BASED ENTIRELY UPON OPINION EVIDENCE.

The issues above set forth were tried by the Court with a jury. The only witness called by the plaintiff was John LeRoy Haskins, a Civil Service employee

of the United States, Department of the Interior, stationed at Morningside Hospital since 1936 as a medical director; who testified that he specialized in psychiatry. His testimony showed that he had no personal knowledge of the actual cost incurred for the care and treatment of George Gartner, and no knowledge of any costs for the care and treatment of insane patients excepting from an examination of various government and other reports. This witness admitted, on cross-examination, that his "opinion" of the reasonable cost of the care of George Gartner was based "entirely" on the contract price for the per capita cost of the care of patients from Alaska entered into between the government and the Sanitarium Corporation, his testimony in that regard being as follows (R. 58):

> "Q. Now I ask you, isn't your testimony based entirely upon the contract price?
>
> A. What else would it be based on?"

Upon this opinion testimony alone the Court directed a verdict for plaintiff over objection by defendants.

OFFERS OF PROOF TO SUPPORT AFFIRMATIVE DEFENSE REJECTED.

Defendants' motion for nonsuit having been overruled, defendants sought to introduce the testimony in support of the affirmative defense, which offers were rejected.

JURISDICTIONAL STATEMENT.

The District Court for the Territory of Alaska is a Court of general jurisdiction (Sec. 1091, CLA '33) in Civil, Criminal, equity and admiralty causes. The Circuit Court of Appeals (Ninth Circuit) has appellate jurisdiction to review by appeal the decisions of the District Court of Alaska. (28 USCA 225.)

ASSIGNMENT OF ERROR I.

THE COURT ERRED IN OVERRULING THE DEMURRER OF THE DEFENDANTS TO THE COMPLAINT OF PLAINTIFF UPON THE GROUNDS THAT THE COURT HAD NO JURISDICTION OF THE SUBJECT OF THE ACTION, AND THAT THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

As heretofore stated the United States is seeking to recover under the Common Law of England claimed to be in effect in the Territory of Alaska. The principal questions raised by the demurrer are:

a. Does the complaint fail to state a cause of action because it fails to allege that there were profits from the estate of Gartner out of which his care and support could be paid?

b. Has the United States, in its sovereign capacity and without statutory authority from Congress the right to recover from an insane person, or his estate, money expended under appropriations by Congress for the care and custody of the insane of Alaska?

A.

Our contention is that the complaint does not state a cause of action at Common Law for the reason that it fails to allege that there were profits accruing from George Gartner's estate out of which the costs of his maintenance could be paid. A consideration of this contention requires that we determine what the Common Law of England was on this subject.

PREROGATIVES OF THE KING OF ENGLAND AS PARENS PATRIAE OF IDIOTS AND LUNATICS BEFORE THE REVOLUTION REQUIRED THAT THE LUNATIC BE MAINTAINED OUT OF THE PROFITS OF HIS ESTATE.

Anciently in England, the custody of the person and property of idiots and lunatics, or at least of those who held lands, was not in the Crown but in the Lord of the fee. In the reign of Henry I, the King as *parens patriae,* or common curator of the realm, assumed exclusive jurisdiction of idiots and lunatics and their estates, and in the statute De Prerogativa Regis passed in the reign of Edward II (17 Edw. II, Ch. 9, 10) it was placed among the King's prerogatives.

32 *C. J.* 626, Sec. 162, Note 87;

Lithiby (Fry's Lunacy Law 4th Ed.) 5.

DISTINCTION BETWEEN IDIOTS AND LUNATICS.

The distinction between idiots and lunatics was at that time important.

> "An idiot, or natural fool, is one that hath had no understanding from his nativity and therefore by law presumed never likely to attain it."
>
> "A Lunatic, or non compos mentis, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason."
>
> I Blackstone Comm. Ch. 9, 304.

The custody of idiots and their lands as hereinbefore stated, was in ancient times not in the Crown but in the Lord of the fee. But, says Blackstone (Bk. I, p. 304):

> "By reason of the manifold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the King as the general conservator of his people; in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. This fiscal prerogative of the King is declared in Parliament by statute 17 Edw. II, 8, 9, which directs (in affirmance of the Common Law) that the King shall have ward of the lands of natural fools, taking the profits without waste or destruction and shall find them necessaries; and after the death of said idiots he shall render the estate to the heirs; in order to prevent such idiots from aliening their lands, and their heirs from being disinherited."
>
> Lithiby, supra, 5;
>
> 32 *C. J.* 626.

The King was also guardian to lunatics, but to a different purpose. Blackstone observes (Book I, p. 304:

> "To these also as well as idiots, the King is guardian, but to a very different purpose. For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II, Ch. 10, that the King shall provide for the custody and sustenation of lunatics, and preserve their lands and profits of them for their use, when they come to their right mind; and the King shall take nothing to his own use; and if the parties die in such a state, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators."

In Fry's Lunacy Laws (3 Ed.) p. 82, the author sets forth the statute 17 Edw. II, under the title "St. Prerogativa Regis," which he states are a modern translation of the original statutes which were in Latin, and are printed in the Statutes of the Realm, Vol. 1, p. 81 of the new revised edition as Ch. XI and XII. They are as follows:

The Custody of Land of Idiots. C. XI.

> "The King shall have the custody of the lands of natural fools, taking the profit of them with-

out waste or destruction, and shall find them necessaries, of whose fee soever the lands be holden; after the death of such idiots, he shall render it (the same) to the right heirs so that such idiots, shall not be aliene nor their heirs be disinherited."

Of the Lands of Lunatics. C. XII.

"Also the King shall provide, when any that beforetime hath had his wit and memory happen to fail of his wit: as there are many (with lucid intervals) that their lands and tenements shall be safely kept without waste or destruction and *that they and their household shall live and be maintained competently with the profits of the same* and *the residue besides their sustantation shall be kept to their use,* to be delivered unto them when they come to right mind; so that such lands and tenements shall in no wise (within the aforesaid time) be aliened, and the King shall take nothing (of the profits) to his own use. And if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary." (The words in parentheses are readings from different manuscripts, see: Fry's Lunacy Laws, p. 82.)

The difference between the two lies in this:

"That the Crown is required, in the case of the lunatic, to account for all the profits taking nothing for its own use (17 Edw. II, Ch. 12); whereas in the case of an idiot or natural fool no such obligation exists; (Ch. XI) for though the Crown is bound to preserve the estate for the benefit of the heirs, it is empowered to take the profit dur-

ing the life time of the idiot, subject to the condition of supplying him with necessaries."

Fry Lunacy Laws (3 Ed.) 9, 10.

THE CROWN WAS UNDER NO DUTY OR OBLIGATION AS TO INDIGENT IDIOTS AND LUNATICS.

"The care exercised by the Sovereign, such as it was, was confined to the case of idiots and lunatics possessed of estates; and neither the Common Law nor the statutes of Edw. II, took any notice of the idiot or lunatic poor for whom, indeed, no provision whatever was made until the present century. In so far as they were destitute, they were provided for like other destitute persons, by the Poor Law; but there was no special provision adapted to their particular affection."

Fry Lunacy Laws (3 Ed.) 7, 8.

Fry also observes, that Blackstone's Commentaries were published in 1765, and it is worthy of notice that he treats this subject in the chapter devoted to the King's Revenue introducing it with this remark: "I proceed, therefore, to the eighteenth and last branch of the King's revenue which consists of the custody of idiots, from which we shall be naturally led to consider also the custody of lunatics."

In Pollock and Maitland's History of the English Law (Vol. I, p. 464) it is said that this document known as *praerogativa regis* seems to be the oldest that gives any clear information about the wardship of lunatics.

> "The King is to provide that the lunatic and his family are properly maintained out of the income of his estate, and the residue of it is to be handed over to him upon his restoration to sanity, or should he die without having recovered his wits, for the good of his soul; but the King is to take nothing to his own use." Bac. Abr. tit. Idiots and Lunatics C.
>
> See, *State v. Ikey,* 84 Vt. 336, 79 A. 850.

It is clear that the object of Statute 17 Edw. II, was to regulate and define the King's Prerogative, and to restrain the abuse of treating the estates of lunatics the same as the estates of idiots. From the foregoing authorities it is manifest *that the King became the trustee of the lunatic and was only entitled to deduct the cost of his care and support from the profits of the estate.* This being so it was necessary for the plaintiff in this action, in order to state a cause of action, to allege and prove that there were profits derived from the estate in an amount sufficient to pay for his care and keep.

B.

Has the United States, in its sovereign capacity and without statutory authority from Congress the right to recover from an insane person, or his estate, money expended under appropriations by Congress for the care and custody of the insane of Alaska?

This involves a consideration of the extent to which the Prerogatives of the Crown have become rights enforceable by the United States, in this action in Alaska, in the absence of congressional enactments.

THE PREROGATIVES OF THE CROWN AFTER THE REVOLUTION DEVOLVED UPON THE PEOPLE OF THE STATES, AND TO THE UNITED STATES TO THE EXTENT DELEGATED BY THE STATES.

In the United States, after the revolution, the care and custody of persons of unsound mind and the control of their estates, which had belonged to the King as a part of his prerogative, as *parens patriae,* became vested in the people of the different states. If the people did not vest this jurisdiction in the Courts by the constitution they left it with the legislature who vested it in the Courts.

32 *C. J.* 627, Sec. 162.

There is no Common Law of the United States. There is no principle which pervades the union and has the authority of law that is not embodied in the Constitution or laws of Congress. The Common Law can be made a part of the Federal system only by legislative adoption.

Wheaton v. Peters, 8 Pet. 591, 658, 8 L. Ed. 1055;

U. S. v. New Bedford Bridge, 27 Fed. Cas. No. 15,867;

Swift v. Philadelphia, etc. R. Co., 64 Fed. 59;

Phipps v. Harding, 70 Fed. 475, 30 L.R.A. 513, 518;

People v. Folsom, 5 Cal. 374, 379;

Gatton v. Chicago, etc., 95 Ia. 112, 63 N.W. 589, 590.

"The United States has no inherent sovereign powers, and no inherent Common Law prerogatives; and it has no power to interfere in the per-

sonal and social relations of citizens by virtue of authority deducible from the general nature of sovereignty; but it has so much of the royal prerogatives as belong to the King of England in his capacity of parens patriae or universal trustee. * * * It has been said that the United States takes no power or authority from State constitutions or laws."

65 *C. J.* 1254, Sec. 4;

In re Burrus, 136 U. S. 586, 34 L. Ed. 500;

In re Barry, 42 Fed. 113, 118.

The sovereign will of the Federal Government is made known by legislative enactments. As was said in *Wheeler v. Smith,* 9 Howard 55, 78, 79, by the Supreme Court of the United States:

"When this country achieved its independence, the prerogatives of the Crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal Government. The sovereign will is *made known to us by legislative enactment. And to this we must look in our Judicial action instead of the prerogatives of the Crown.* The State, as sovereign is the parens patriae."

See also, *Fontain v. Ravenel,* 58 U. S. 369, 384.

In the *Morman Church v. U. S.,* 136 U. S. 1, 57 (31 L. Ed. 464, 496), the Court said:

"This prerogative of parens patriae is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the legislature and has no affinity to those arbitrary

powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction to their liberties * * *."

In *Fontain v. Ravenel,* supra, p. 384, the Court said:

"These prerogative powers which belong to the sovereign as parens patriae remain with the state * * * . But state laws will not authorize the Court of the United States to exercise any power that is not in its nature judicial; nor can they confer on them prerogative power over minors, idiots and lunatics or charity, which the English Chancellor possessed."

"The doctrine of parens patriae * * * may be defined as the inherent power of the legislature of a State to provide protection of the person and property of persons non sui juris such as minors, insane and incompetent persons."

46 *C. J.* 1212, Note 8.

The National government has power of *parens patriae* in the Territory of Alaska. In *Mormon Church v. U. S.,* supra, in a case arising in the then Territory of Utah, the United States Supreme Court held that the National government has the power of *parens patriae* in the Territory of Utah, that that power resident in the States ordinarily, resided in the National government so far as the Territories of the United States are concerned.

Hoadly v. Chase, 126 Fed. 818, 820.

RIGHT OF THE UNITED STATES TO BRING THIS ACTION.

The Supreme Court of the United States in *Wheeler v. Smith,* 9 How. 78, supra, after stating that the prerogatives of the Crown, as *parens patriae,* devolved upon the States and that this power still remains with them, except in so far as they have delegated a part of it to the Federal Government, then says:

> "The sovereign will is made known to us by legislative enactment. *And to this we must look in our judicial action, instead of the prerogatives of the crown.* The State, as a sovereign is the parens patriae."

There is considerable conflict between the various states as to whether the states have succeeded to the royal prerogatives of the British Crown, by the adoption in the State of the Common Law. In other words as to whether by adopting the Common Law in the State it carried with it the King's prerogatives.

In *Brown v. American Bonding Co.,* 210 Fed. 844, this Court had under consideration the question whether the State of Montana, by adopting the Common Law by legislative enactment, succeeded to the prerogatives of the British Crown that gave the Crown a preference for a debt due it over other creditors. The Court held that it did not, although the Supreme Court of that State had held to the contrary.

In its opinion this Court quoted the language of the Supreme Court of the United States in *United*

States v. Bank of North Carolina, 6 Pet. 29, 35 (8 L. Ed. 308) as follows:

> "The right of priority of payment of debts due to the government is a prerogative of the Crown well known to the Common Law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens, and discharge the public debt. The claim of the United States, however, *does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statute.* The same policy which governed in the case of the royal prerogative may be clearly traced in these statutes, and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation according to the just import of their terms."

This Court then continues as follows:

> "If, as there expressly held by the Supreme Court, the priority of debts due the government of the United States does not stand upon any sovereign prerogative, but is exclusively founded upon their own statutes, we are unable to understand how the right of priority of payment of debts due a state can be founded upon such a prerogative. Surely no state can have any greater sovereign right than the general government of the entire country."

UNITED STATES SEEKS TO RECOVER UPON A LOCAL LAW OF ALASKA.

Plaintiff conceded at the trial that its cause of action is not founded on any statute of the United States. Plaintiff seeks to recover under Sec. 3271 of the Compiled Laws of Alaska, 1933, that provides:

> "So much of the Common Law as is applicable and not inconsistent with the constitution of the United States or with any law passed, or to be passed, by Congress or the Legislature of Alaska, is adopted and declared to be the law in the Territory."

The District Court, in its written opinion, states that the question involved, is as follows:

> "As our code made the Common Law of England except as modified by statute, the law of Alaska during all time concerned in this case, it becomes necessary to ascertain what the Common Law was with reference to reimbursement of the sovereign for expenses incurred in the care of an insane person." (R. 7.)

The Common Law of Alaska is not a law of the United States. It is a local municipal law of the Territory prescribed by the supreme power, the Congress of the United States, for the benefit of the inhabitants of Alaska.

The Supreme Court of the United States, in *Am. Ins. Co. v. Canter,* I Pet. 511, 546 (7 L. Ed. 242, 256), said through Marshall, C. J. that:

> "Congress in legislating for them (Territories) exercises the combined powers of the general and state government."

Congress, in giving the Territories an Organic Act, does not and cannot delegate any of its sovereign authority; for not only can the organic acts be altered or abolished, but all laws made under and by virtue thereof by the Territorial legislature, are subject to Congressional supervision, showing that sovereignty alone resides with Congress.

Territory v. Lee, 2 Mont. 124, 133.

The relation of the Territories to the United States is said to be that which *countries bear to the respective states.*

> "The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations."
>
> *First Nat. Bank of Brunswick v. Yankton,* 101 U. S. 129, 133, 25 L. Ed. 1047.

In *Aetna Casualty & Surety Co. v. Bramwell,* 12 Fed. (2d) 308, 309, the question presented was whether a county of the state of Oregon had the same right of preference with respect to deposits in banks, which the state enjoys in its sovereign capacity, the Supreme Court of that state having previously held that under the Common Law in force there that the state is entitled to a preference *as a prerogative right* over unsecured creditors. Judge Wolverton, in his opinion, said:

> "It is said that there is no Common Law as to the national government, but that generally it

does obtain as to the states. *So that, while it is requisite that Congress declare by law that the general government shall have priority with respect to claims against insolvents,* etc., it is argued that the states possess that privilege or right in pursuance of the Common Law in the absence of appropriate legislation to the contrary. And such is the holding of the Supreme Court of this state."

"However, prerogative where it exists appertains to sovereignty. The State is the sovereign. Does that prerogative appertain to the counties of the state? * * * It has received judicial consideration in several of the states. The most recent case treating of the subject is Bignell v. Cummings, 69 Mont. 294; 222 P. 797, the opinion is by Callaway, C. J., and is exhaustive and able. It should be premised that that state is one of those concurring with the state of Oregon in the principle that the prerogative right of priority respecting public funds obtains by virtue of the Common Law. State v. Madison State Bank, 68 Mont. 342, 218 P. 652. * * * In the Bignell case it was held that this prerogative did not extend to the counties of the state. In support thereof the learned Chief Justice had this to say: 'Sovereignty must involve the general interest of the state at large. It is true that the whole state has an interest in the proper administration of its law everywhere within its borders, and so it has an interest in the proper government of every county, and so it has in every municipality, and in the conduct of every school district, and in the prosperity of every citizen. But, while the prerogative of the state may be invoked for the protection of the

rights of the county, municipality, school district, and citizen, it does not follow that any of these possess that power. *It must be held that the sovereign right, the prerogative, is lodged in the political power which is created by and is the representative of all the people, the state itself, and that the prerogative of the state may not be exercised by its creature, in the absence of express authority granted to the creature.'* It is further asserted by the court that the county is but a creature of the state, which may be abolished by the will of the state, *and that the statutes constitute the charter of a county's power, and to them it must look for the evidence of any authority sought to be exercised."*

See also:

County of Glynn v. Brunswick Terminal Co., et al., 101 Ga. 244, 28 S.E. 604;

U. S. Fidelity & Guaranty Co. v. Rainey, 120 Ten. 357, 405, 113 S.W. 297;

State v. Bank of Tenn., 5 Baxt. (Tenn.) I;

Leeper v. State, 103 Tenn. 528, 53 S.W. 962, 48 L.R.A. 167;

The Matter of Carnegie Trust Co., 206 N.Y. 390, 99 N.E. 1060, 46 L.R.A. (N.S.) 260;

In re Northern Bank, 148 N.Y.S. 70;

Id., 212 N.Y. 608, 106 N.E. 749.

In *U. S. Fidelity & Guaranty Co. v. Bramwell,* 217 Pac. 332, the Supreme Court of Oregon, after holding that the Common Law of England, with limitations, had been adopted in that State, in speaking of the royal prerogatives of the British Crown, points out

that according to Blackstone, they were of two classes, viz.:

> (335) "Prerogatives are either direct or incidental. The direct are such positive substantial parts of the royal character and authority as are rooted in and spring from the King's political person, considered merely by itself, without reference to any other extrinsic circumstance; as the right of sending embassadors, of creating peers, and of making war or peace. But such prerogatives as are incidental bear always a relation to something else distinct from the king's person; and are indeed only exceptions, in favor of the crown to those general rules that are established for the rest of the community; such as, that no cost shall be recovered against the king; that the king can never be a joint tenant; and that his debt shall be preferred before a debt to any of his subjects." I Black. Com. (Cooley's 4th Ed.) 240.

The Oregon Court then states that it is clear that none of the royal prerogatives that are classified as direct, by Blackstone, are adapted to or suitable for our needs and conditions, and hence, the Common Law rules by which these prerogatives were established and maintained are not in force in this state; but that the incidental prerogatives which have no relation to the King's person and constitute exceptions in favor of the Crown and which from their very nature, are essential to the welfare of the people of the state have been adopted, and the Common Law rules by which these rights were established have become the law of the State.

There is considerable conflict of opinion in the States as to whether or not the prerogatives of the King which became vested in the people of the States in inherent in the sovereignty of the States or must rest upon legislative enactment.

The Supreme Court of Oregon holds that the prerogatives which are adapted to the circumstances, conditions and necessities of the people, because essential to sustain the public burdens and discharge the public debts, became a part of the law of that State by virtue of the Common Law. *The Court then proceeds to point out that the rule as to the United States is different and that before the right can prevail* in favor of the National Government it must rest exclusively upon a Federal Statute. The language of the Court being as follows:

> (338) "As to the government of the United States, the rule is different. Before the right can prevail in favor of the National Government, it must rest exclusively upon a Federal statute, for in United States v. Bank of North Carolina, 31 U. S. 19 (6 Pet. 29), 8 L. Ed. 308, the Court said:
>
> > 'The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes.'
>
> From this the defendant argues that there must be a state statute conferring this right upon the state before the right can exist in favor of the state. But it is pointed out in U. S. Fid. & Guar. Co. v. Borough Bank of Brooklyn, 161 App. Div. 479, 486; 146 N. Y. Suppl. 870, 875; that the reason for the priority right of the Federal Gov-

ernment being dependent upon, and not existing independently of, a Federal statute, is the fact that—

> 'There is no Common Law of the United States, in the sense of a national customary law, distinct from the Common Law of England as adopted by the several states each for itself, applied as its local law.' (Citing cases.)

As the Federal Government does not have a customary Common Law of its own, distinct from that of the states themselves, it necessarily results that the right itself must depend exclusively upon a federal statute, * * *."

In the light of these authorities it must be deemed that the United States stands in the relation of *parens patriae* with respect to insane persons in the Territory of Alaska, and that the prerogative of *parens patriae* can only be exercised by Acts of Congress. Plaintiff concedes that there is no statute, Federal or Territorial, which in express terms authorizes a recovery in the instant case.

COMMON LAW OF ENGLAND AS TO IDIOTS AND LUNATICS HAS NEVER BEEN IN FORCE IN ALASKA.

Alaska was ceded to the United States by Russia on June 20, 1867. It became an Organized Territory of the United States, when the Act of May 17, 1884, entitled "An Act Providing for Civil Government for Alaska" was approved.

Binns v. U. S., 194 U.S. 486, 491, 48 L. Ed. 1087.

Section 7, of the Act of May 17, 1884, adopted the general laws of Oregon for the then District of Alaska. It provided:

> "That the general laws of the State of Oregon now in force are hereby declared to be the law in said District in so far as the same may be applicable and not in conflict with the provisions of this Act, or the laws of the United States." (23 Stat. 24, 25, 26.)

COMMON LAW AS TO IDIOTS AND LUNATICS WAS NEVER IN FORCE IN OREGON.

The Common Law was in force, in Oregon, on May 17, 1884, to the extent only, as declared by the Supreme Court of that State, in *Peery v. Fletcher,* 93 Or. 43, 182 P. 143, as follows:

> (147) "In many jurisdictions in the United States the rules of the Common Law of England have been held by the Courts to be in full force so far as the same are applicable and of a general nature, and are not in conflict with the Constitution or special enactments of the Legislature. *This is the rule in Oregon.* See note, 30 Ann. Cas. 1913 E. 1232, 1241; Brummet v. Weaver, 2 Or. 168; Rugh v. Ottenheimer, 6 Or. 231; Velten v. Carmack, 23 Or. 282; 31 Pac. 658, 20 L.R.A. 101."

Under this rule the Common Law was in force in Oregon on May 17, 1884, to the extent only it was applicable and of a general nature, and *not in conflict with the Constitution or special enactments of the Legislature.*

SPECIAL ENACTMENTS OF OREGON LEGISLATURE AS TO INSANE AND IDIOTS.

The special enactments of the Legislature of Oregon, on May 17, 1884, covered the entire subject matter. They provided for a board of trustees, consisting of a Governor, the Secretary of State,* and State Treasurer,* to be known as the "Board of Trustees of the Oregon State Insane Asylum." The trustees were authorized to receive, take and hold property, in trust for the State, and for the benefit of the asylum. They had the power to govern, manage and administer the affairs of the asylum; make and adopt by-laws for their government and the government of the asylum. They had the power to appoint all officers and employees of the asylum and to appoint a medical superintendent and assistant.

The powers and duties of the trustees are set forth in Sections 3549 to 3556, of Hill's Ann. Laws of Or. (1887) Ch. XLIX, p. 540, and we deem it unnecessary to set them forth in greater detail here.

Section 3557 of Hill's Ann. Laws (1887) was not in force in Oregon on May 17, 1884. Upon that day Section 3 of the Act of October 18, 1878 was in force. (Laws of Or. 1878.) The first part of Section 3 of the Act of 1878 was very similar in substance to Section 3557 above referred to, and it provided that the County Judge, upon the application of any citizen setting forth that any person or persons by reason of insanity or idiocy, is suffering from neglect, exposure,

*Clerk of District Court, by Act of 1884 (Sec. 4), was made ex-officio Secretary and Treasurer of the District of Alaska.

or otherwise, or is unsafe to be at large, shall cause said person to be brought before him, at such time and place as he may direct, and that said County Judge shall also cause to appear at said time and place one or more competent physicians, who shall proceed to examine the person or persons alleged to be insane or idiots, and if said physician or physicians, after careful examination, shall certify upon oath, that said person or persons are insane or idiotic, as the case may be, then the Judge, if in his opinion said person or persons be insane or idiotic, shall cause said person or persons to be placed in the insane asylum in the State of Oregon.

The latter part of Section 3 of the Act of October, 1878, contains a proviso in substance as follows:

> "Provided, further, that the County Judge shall make diligent inquiry, and when an insane or idiotic person, committed under this Act, shall be found to own any estate, real or personal, said Judge shall immediately, without petition or notice, appoint a guardian for the estate of such person, who shall execute his trust, under the direction of said court, make the same returns and give the same security as in the case of a minor, and said estate shall be liable to the County for the cost of such commitment, and to the State for the cost of conveying such insane or idiotic person to the asylum, and keeping him while there. In case there be a wife and child or children, or either, dependent on said estate for support, the County court shall make proper allowance for their support out of the estate. A husband shall be liable to the County for the cost

> of committing his insane or idiotic wife to the asylum, and to the State for the cost of conveying her to the asylum, and keeping her while there; and parents of minor children committed as insane or idiotic shall be in like manner liable to the County for the cost of such commitment; and to the State for the cost of conveying such insane or idiotic minor children to the asylum, and keeping them while there. The State shall hold a lien in the nature of a judgment against the estate of a husband, for the cost of sending his wife to the asylum, and keeping her there, when committed as insane or idiotic, and against the estate of parents for the cost of sending their minor children to the asylum, and keeping them there, when committed as insane or idiotic. It shall be the duty of the prosecuting attorney for each judicial district to cause to be appointed the guardian herein provided, etc."

The Oregon Law also provided on May 17, 1884, in Section 3558, Hill's Code, supra, that the County Judge should enter in the records the proceedings had upon such application, and required him to make a warrant reciting his findings, etc., the cause of insanity, the name, age, nativity, and residence of the insane person and that the warrant should be recorded; and that a copy thereof must be sent with the patient to the superintendent of the asylum and another to the Secretary of the State, to be filed in his office.

GUARDIANS TO BE APPOINTED FOR ESTATES OF INSANE OR IDIOTIC.

The laws of Oregon on May 17, 1884, providing for the appointment of guardians for insane persons and for the protection of their person and property are set forth in Title 3, Ch. XXVIII, p. 1235, and Ch. XXIV, p. 1388, of Hill's Code.

APPLICABILITY OF THE OREGON LAW TO ALASKA.

The general laws of Oregon as of May 17, 1884, so far as applicable and not in conflict with that Act or the Laws of the United States were adopted for the District of Alaska. Were the laws of Oregon as above summarized, in conflict with the Act or the Laws of the United States? That they were not in conflict is obvious, for there was no law of the United States on that subject, and the Act made no provision therefor except to adopt the general laws of Oregon.

That the Oregon laws were applicable there can be no doubt, as is evident from the following quotations:

> "The term 'applicable' as used in the doctrine that the Common Law is adopted only so far as it is applicable to us as a people and may be of a general nature, means that in adopting the Common Law it must be applicable to the habits and conditions of our society and in harmony with the genius, spirit and objects of our institutions."
>
> *Wagner v. Bissell,* 3 Iowa 395, 402.

> "A general law should always be construed to be applicable in the constitutional sense where the

entire people of the state have an interest in the subject, such as regulating interest, the statute of frauds and limitations, etc."

Evans v. Job, 8 Nev. 322, 336;

Alaska Gold Mining Co. v. Ebner, 2 Alaska 611;

4 *C. J.* 1398.

The Oregon laws were of a general nature and applicable to the habits and conditions of the people of Alaska and in sympathy with the spirit and object of its institutions. *They became a part of the general law of Alaska.*

Under the Act of May 17, 1884, the Common Law was not adopted for Alaska. It, therefore, follows that the laws of Oregon became a part of the Laws of Alaska, as to insane persons, or there was no law in Alaska covering that subject, until June 6, 1900.

COMMON LAW ADOPTED FOR ALASKA BY THE ACT OF JUNE 6, 1900.

The Common Law was not adopted by Congress for Alaska, until the Act of June 6, 1900, entitled "An Act Making Further Provision for a Civil Government for Alaska and For Other Purposes" (31 Stat. 321, 552), was enacted.

The Act provides that:

"So much of the Common Law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be

passed by the Congress is adopted and declared to be law within the District of Alaska." (C.L.A. 1913, Sec. 796, p. 362.)

This section was amended by the Legislature of Alaska in 1933, by inserting after the word "Congress" the words "or the Legislature of Alaska." (C.L.A. 1933, Sec. 3271, p. 660.)

LAWS OF OREGON IN FORCE IN ALASKA AS TO INSANE PERSONS NOT REPEALED BY THE ACT OF JUNE 6, 1900, EXCEPT IN PART.

The Act of June 6, 1900, contained a repeal clause in words as follows:

"* * * All Acts or parts of Acts in conflict with the provisions of this Act are hereby repealed."
Carter's Code Part 5, Ch. 36, Sec. 367, p. 432; C.L.A. 1913, Sec. 797, p. 362.

The Act of June 6, 1900, provided that:

"He (Governor) shall, subject to the direction and approval of the Secretary of the Interior, advertise for and receive bids and, in behalf of the United States, contract from year to year with a responsible asylum or sanitarium west of the main range of the Rocky Mountains submitting the lowest bid for the care of persons legally adjudged insane in said District of Alaska; the cost of advertising for bids, executing the contract and caring for the insane to be paid, until otherwise provided by law, by the Secretary of the Treasury, out of any money in the treasury not otherwise appropriated, on accounts and

vouchers duly approved by the Governor and the Secretary of the Interior."

Carter's Code of Alaska, Part 3, Title 1, Ch. 1, Sec. 2, p. 132.

The above provision being in conflict with Sections 3549 to 3556, of Hill's Code, supra, providing for the maintenance and management of a State Insane Asylum necessarily repealed them.

The Act of June 6, 1900, reenacted the provisions of the Oregon Code for the appointments of guardians for the protection of the persons and estates of the insane and by so doing continued them in force. Chapters XXVIII of Title 3, p. 1235 and Ch. XXIV, p. 1388 of Hill's Code, became Ch. LXXXVIII and LXXXIX of Carter's Code, pp. 327, 333.

There was no provision in the Act of June 6, 1900, for a judicial hearing to determine the question of insanity and for the commitment of insane persons to an asylum, or any provision for reimbursement for the cost of his care and support, etc., so consequently the Laws of Oregon providing therefor remained in full force and effect as they were not in conflict with the Act of June 6, 1900.

The laws of Alaska relating to insane persons as of June 6, 1900, therefore, provided: (a) by an Act of Congress for the care and treatment of persons adjudged insane in Alaska, by contract; (b) for the appointment of guardians to protect the persons and estates of insane persons; and (c) the laws of Oregon as to a judicial hearing to determine the question of

insanity and the procedure in regard to committing an insane person to the asylum remained in full force and effect.

ADDITIONAL ACTS OF CONGRESS RELATING TO INSANE.

That portion of the Act of June 6, 1900, above quoted, authorizing the Governor, subject to the direction and approval of the Secretary of the Interior, to advertise for and receive bids, etc., was amended by the Act of April 28, 1904 (33 Stat. 526) and finally amended by the Act of February 6, 1909 (35 Stat. 601) and, as so amended, reads as follows:

> "The Secretary of the Interior shall hereafter as in his judgment may be deemed advisable, advertise for and receive bids for the care and custody of persons legally adjudged insane in the Territory of Alaska, and in behalf of the United States shall contract, for one or more years, as he may deem best, with a responsible asylum or sanitarium west of the main range of the Rocky Mountains, submitting the lowest and best responsible bid for the care and custody of persons legally adjudged insane in the Territory of Alaska, the cost of advertising the bids, executing the contract, *and caring for the insane to be paid from the appropriations to be made for such service upon estimates to be submitted to Congress annually.*" (Feb. 26, 1909, Ch. 80, Sec. 7; 35 Stat. 601; 48 U.S.C.A., Sec. 46; C.L.A. '33, p. 898.

CONGRESSIONAL ACTS ESTABLISHING PROCEDURE FOR DETERMINING INSANITY AND FOR COMMITMENT OF INSANE PERSONS.

Congress by the Act of January 27, 1905 (33 Stat. 619, 620; C.L.A. 1913, Sec. 831, p. 372), conferred upon the Commissioners, appointed by the Judges of the District Court in Alaska, as ex-officio probate judges, power to commit by warrant all persons adjudged insane in their district to the asylums or sanitariums provided for the care and keeping of the insane of Alaska.

The Act prescribed the procedure to be followed in detail requiring a complaint in writing, a trial by jury, the appointment of a suitable attorney before trial to represent the person complained against, the examination of the person before trial by a physician or surgeon, if procurable, and the testimony under oath of the physician or surgeon, after the examination and before the jury as to the mental condition of the person.

It also provided that the commissioners preside at the hearing and trial; that all witnesses must testify under oath and that after testimony had been heard, that the jury shall retire to agree upon their verdict; and if the jury unanimously, by their verdict in writing, find the person so charged with being insane is really and truly insane and that he ought to be committed to the designated asylum or sanitarium, and the commissioner approves such finding, he shall enter judgment adjudging said person to be insane and that he be at once conveyed to and thereafter properly

and safely kept in said asylum or sanitarium until duly discharged.

That the commissioner shall thereupon issue a warrant, with a copy of the judgment attached, for the commitment of the insane to said asylum or sanitarium; which warrant shall be delivered to the Marshall of the division to execute the same. That the cost of the same shall be paid by the Clerk of the Court as incidental expenses.

DETENTION HOSPITALS FOR TEMPORARY CARE.

The Act of June 25, 1910, provides for the establishment of a detention hospital at Fairbanks and Nome for the temporary care and detention of the insane and also for a Board of Construction to consist of the District Judge and the U. S. Marshal of the judicial divisions in which the detention hospital shall be built. (C.L.A. 1913, Sec. 832, 832a; C.L.A. 1933, pp. 897, 898.

Congress having fully legislated upon the subject seems to have been well satisfied with the enactments and also of the policy of paying for the care and support of the insane by annual appropriations. We assert this to be so because in the Act of August 12, 1912 (C.L.A. 1913, p. 268, Sec. 410; C.L.A. 1933, p. 166, Sec. 464), it is provided among other things:

> "That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend * * * to the

'care and support of insane persons in the District of Alaska, and for other purposes,' approved January 27, 1905, and the several acts amendatory thereof."

These are the statutory enactments of Congress that have been in force in Alaska since 1905, and up to October 14, 1942. They cover the whole subject matter of the care, custody and support of the insane, except the statutes making annual appropriations for the payment of their care and support. Prior to the Congressional Acts, the laws of Oregon likewise covered the whole subject matter, until they were abrogated and superceded by the Acts of Congress hereinbefore set forth. *Therefore the Common Law as to idiots and lunatics is not and never has been in force in Alaska.*

LAW OF OREGON ABROGATED.

The congressional Acts as to insane persons, comprehending as they do the entire subject, superceded and abrogated the Oregon Laws then in force in Alaska covering the same subject including the provision requiring the insane to pay for their keep at the asylum. If there is any doubt about this it is forclosed by the fact that none of the Oregon laws relating to the insane and idiotic were included in the "Compiled Laws of the Territory of Alaska 1913," that were codified, compiled, arranged and published under the Act of Congress of August 24, 1912.

See, pp. 1, 2 and Sec. 2593, p. 794, C.L.A. 1913.

"The code or revision is intended to take the place of the law as previously formulated, and to include all statute law * * * of a general or permanent nature, up to the time of its adoption."

59 *C. J.* 888.

COMMON LAW REPEALED OR ABROGATED BY ACT OF CONGRESS.

The Congressional Laws undertake to regulate the care and custody of the insane and agrees with the Common Law in some particulars and disagrees as to others. Insofar as they agree there is no concurrent authority. The Congressional Law prevails. The Congressional Laws are not a supplement, but a substitution. If the Congressional Law undertakes to cover in a specific manner things already covered by the Common Law and omits therefrom certain matters also covered by the Common Law, such omission must be considered a legislative repeal or abrogation of the omitted parts.

In the case of *In Re Lord, etc. Co.,* 7 Del. 715, it was held that where the statute and the Common Law differ, the statute prevails; and that, where the statute undertakes to regulate the conduct of a matter covered by the Common Law and omits a part of it, the omission will be taken as an intention to repeal or abrogate it. The Court illustrates its view as follows:

"Take, for example, our own Statute of Frauds. It does not contain some of the provisions of the English Statute, but the *omitted parts* thereof,

> for the reason above stated, have never been held to be in force in this state since the enactment of our own statute."
>
> *In Re Lord, etc., Co.,* 7 Del. Ch. 248.

> "Common Law can neither add to nor take from statutory rule, when legislature has assumed to establish rules of property or conduct."
>
> *President and Fellows of Harvard College v. Jewett,* 11 F. (2d) 119, 123.

It follows therefore that if the rule at Common Law is as contended by plaintiff, then the omission of Congress to reenact that part that allows re-imbursement for reasonable costs, out of profits show an intent on the part of Congress to repeal and abrogate the omitted part. Particularly is this true in view of the fact that the Act of Congress of January 27, 1905, contains a repeal clause as follows:

> "That all Acts and parts of Acts inconsistent with this Act are to the extent of such inconsistencies repealed (33 Stat. 619)."

Surely the intent of the Congress that the cost of the care and custody of the insane shall be paid as a Civil expense of Government from public funds is inconsistent with the Government's present contention that it is entitled to recover from the defendant the reasonable cost of his care and keep.

ASSIGNMENT OF ERRORS.

II. (R. 96.) THE COURT ERRED IN SUSTAINING PLAINTIFF'S DEMURRER TO DEFENDANTS' FIRST AND SECOND AFFIRMATIVE DEFENSES STATED IN THEIR AMENDED ANSWER UPON THE GROUNDS THAT SAID DEFENSES FAILED TO STATE SUFFICIENT FACTS TO CONSTITUTE A DEFENSE.

"XIII. (R. 111.) The Court erred in refusing to permit testimony on the part of Defendants by the witness Clegg to establish that Plaintiff had never before in the history of Alaska claimed recompense from the estates of insane persons for care prior to 1942, the proceedings relating thereto being as follows:

'Q. And in your experience do you know personally, or have you ever heard of any law suit or claim having been made by the federal government for recompense from the estate of insane persons of the cost of the care and maintenance of those persons in Morningside prior to the year 1942.

Mr. Arend: If the Court please, we object to the question as irrelevant, incompetent, immaterial and not in issue in this case.

The Court: Objection sustained.' "

"XIV. (R. 112.) The Court erred in refusing the offer of Defendants to establish by testimony that prior to 1942 Plaintiff cared for the insane as a gratuity given without intent of recoupment, the proceedings relating thereto being as follows:

'Mr. Clasby: In addition to the answer "no" to the question that has been asked, we offer to prove by this witness, if he were permitted to answer, that it was the general understanding

among the bench and the bar of Alaska, from the year 1900 to 1942, insofar as this witness is acquainted with it, that the payments made by the government for the care and maintenance of insane persons were made as a gratuity and without any policy or expectation of recovery or recouping those expenses.

Mr. Arend: We object to the question as incompetent, irrelevant, and immaterial and not binding upon the government.

The Court: Objection sustained.' "

We will consider these assignment of errors together.

The First Affirmative Defense of the amended Answer (R. 22) alleges in substance, (a) that the monies appropriated annually for the care and maintenance of the insane who were committed to Morningside, were made "as a gratuity and charity" and without any thought or expectation upon the part of Congress or plaintiff that any part thereof was to be repaid by the insane persons; (b) that ever since the Act of May 17, 1884, up until the Act of Congress, October 14, 1942, plaintiff never requested or made any demand upon any insane person or legal representative for reimbursement for any monies that may have been paid for his care or maintenance; (c) that by its acquiescence from the years 1884 to 1942 in said policy that plaintiff should not be permitted to assert that monies expended by it as a gratuity and charity should now be recovered from the insane person or his legal representative.

The evidence sought to be introduced and the offers of evidence made to prove the allegations of the affirmative defense would undoubtedly, if proven, defeat plaintiff's cause of action. The sustaining of the demurrer and the rejection of the evidence offered constitute therefore error of a very substantial nature.

GRATUITY AND CHARITY.

In order to show that the appropriations made by Congress for the care and custody of the insane were of a benevolent and charitable nature we must consider the following factors: (a) the language of the Acts of Congress themselves; (b) the contemporaneous and subsequent Congressional legislative construction thereof; (c) the executive construction of the Acts of Congress by the Secretary of the Interior and other agencies of government charged with their execution and enforcement.

The factors (a) and (b) present questions of law only. The factor (c) however, requires the evidence that we sought to introduce at the trial. However, the demurrer admits the facts alleged for the purposes of this appeal, and in this light we will consider them.

THE LANGUAGE OF THE ACTS OF CONGRESS AS SHOWING A GRATUITY.

We have, heretofore, pointed out that Congress, in the Act of June 6, 1900 (Carter's Code, p. 432), provided, that,

> "* * * ; the cost of advertising for bids, executing the contract and caring for the insane, to be paid, until otherwise provided by law, out of any money in the Treasury not otherwise appropriated, on accounts and vouchers duly approved by the Governor and the Secretary of the Interior."

This language is plain and says that the cost of caring for the insane shall be paid out of public monies, not by the insane person or out of his estate but out of money in the Treasury not otherwise appropriated.

By the Act of April 28, 1904, as amended (48 U.S. C.A. 46) Congress transferred from the Governor of Alaska to the Secretary of the Interior the duty of advertising for bids, entering into contracts, etc., for the care and custody of the legally adjudged insane of Alaska. This Act provided,

> "that the cost of advertising the bids, executing the contract, and caring for the insane to be paid from appropriations to be made for such service from estimates to be submitted by Congress annually." (48 U.S.C.A., Sec. 46.)

CONGRESSIONAL CONSTRUCTION.

Congress, pursuant to the above Act, on June 12, 1906 (34 Stat. 254), in an Act entitled "An Act making Appropriations for sundry Civil Expenses of the Government for the fiscal year ending June 30, 1907, and for other Purposes," provided funds: "For the care and custody of persons legally adjudged insane

in the District of Alaska, including transportation and other expenses."

This appropriation was made in aid of and for the purpose of carrying out the Act of April 28, 1904, supra; and it declares that the appropriations "for the care and custody of persons legally adjudged insane in Alaska, including transportation and other expenses, is a *'civil expense of government'.*" This is tantamount to a Congressional construction of the Act of April 28, 1904, so as to make said Act read that the cost of advertising for bids, executing the contract and caring for the insane is to be paid as a *public expense* from appropriations to be made for such service by Congress.

Congress has annually, since 1906, enacted appropriation bills of like purport and effect. By declaring that the appropriations for the caring of the insane of Alaska is (a) "civil expense of government", it is manifest that the appropriations annually made is for a beneficent and charitable purpose. If it were otherwise and Congress intended that during the period from 1900 to 1942, that each patient committed to Morningside should pay for the reasonable cost of his care and custody, irrespective of his ability to pay, why did not Congress say so? And why, also, have the administrative officers been so negligent and lax in the performance of their duty to collect the same?

The intent of Congress is again made clear by Congressional construction in the Act of August 24, 1912 (37 Stat. 512), creating a Legislative Assembly

for Alaska in which it was provided that the authority granted the legislature

> "to alter, amend, or repeal laws in force in Alaska shall not be extended * * * to the Act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes' ". C.L.A. 1933, p. 166, Sec. 464.

The use of the words "care and support" are significant. It shows that Congress by its annual appropriations had supported, and intended to continue to support, the legally adjudged insane of Alaska, *and they wanted no interference by the legislature of Alaska on this score.*

The word "support" has been defined by Webster as follows: (5) "To furnish with funds or means for maintenance; to maintain; to provide for, as to support a family", Web. New Inter. Dict.

It is impossible for us to believe that the Congress of the most humane government on earth would impose a charge upon the insane and their estate without taking into consideration their ability to pay. The rule that the government is seeking to enforce in this case, is so draconian that, if enforced, after a lapse of some forty years, will be so oppressive and burdensome that many of the estates of the insane, against whom similar actions to this are now pending and may hereafter be brought, would become bankrupt and their families reduced to destitution. The

Act of October 24, 1942, is in striking contrast to the rule that the government is seeking to enforce here. Under this humane Act the charge or contribution that may be imposed on the insane, his estate or relatives, *is limited to their ability to pay as determined by the Secretary of the Interior.* Under the Common Law *the King of England was limited to the profits of his ward's estate without waste or destruction.* The rule the government is invoking here is so inflexible and rigid that if enforced it must take its "pound of flesh" no matter how destructive the consequences may be.

If the rule invoked by the government is the Common Law we submit that it has no place in the laws of Alaska as it is not in accord with the policy of Congress as declared in the Act of October 14, 1942, nor is it applicable to the habits and conditions of our society or in harmony with the genius, spirit and *humanity* of our institutions.

SILENCE AND NON-ACTION.

As heretofore pointed out Congress has legislated fully as to the insane of Alaska and has covered the entire subject matter and has never required any payment from insane patients until October 14, 1942. It must therefore be presumed that it was the intent and policy of Congress that the insane of Alaska should not be charged for their care, treatment and support. *Its silence on this subject is significant.* The Supreme Court of the United States, in *Transporta-*

tion Co. v. Parkersburg et al., 107 U.S. 691, 702 (27 L. Ed. 584, 588), said:

> "In such cases, the non action or silence of Congress, will be deemed to be an action of its will, that *no exaction* or restraint shall be imposed".

We submit therefore, that it must be presumed that up and until October 12, 1942, that Congress in providing a hospital for the care and support of persons legally adjudged insane in Alaska, acting in its capacity as *parens patriae,* was actuated by motives of charity and benevolence. That no pecuniary obligation was intended or created against the patients who had been involuntarily compelled to accept the benefits. The government having dispensed charity cannot now recover the cost incurred upon an implied obligation to pay or in the absence of an express contract.

EXECUTIVE CONSTRUCTION.

Furthermore, the fact that the officers of the government and particularly the Secretary of the Interior neglected for some forty-two years to make any effort to collect from insane patients or their estates the cost of their care and support, furnishes the most persuasive evidence that the patient was not liable and that no implication for a promise to pay arises and that the money so expended cannot be recovered.

That the Secretary of the Interior and the agencies of the government charged with the administra-

tion of the law, believed that there was, up until October 14, 1942, no Common Law in Alaska authorizing a recovery, is manifest by their inaction over a period of some forty-two years.

Again the contract entered into between the Sanitarium Company and the United States provided that the Company should furnish the patient with clothing, food, medical supply, dental work, recreational facilities, in short, everything needed by him. (R. 37.) The witness, Haskins, was asked:

> "Q. Did the Sanitarium corporation try and keep any separate account on individual patients or would they just bulk all of them?
>
> A. They just bulk them. You get one patient who might need a lot of hospitalization and need infirmary nursing all of the time; another patient might need little. You got to bulk them that way." (R. 57.)

If the Congress and the executive departments of our government in good faith believed that the insane were liable for the reasonable cost of their keep, why did they not so declare and insert in the contract a clause requiring that a separate account be kept for each patient?

CONTEMPORANEOUS CONSTRUCTION.

Contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled, under the circumstances of this case and in view of the long period of time involved, to great weight. "Contemporaneous

construction" within the meaning of the rule, is the construction which executive departments or officers charged with the enforcement of the statute, give to it, at or near the time of its enactment.

59 C.J. 1028, Sec. 609.

In some cases the Courts have treated contemporaneous and long followed construction of a statute by executive officers or departments as controlling, or as having the effect of a positive law.

59 C.J. 1029.

In *Schell's Executors v. Fauche,* 138 U.S. 562, 572, it is said:

> "In all cases of ambiguity the contemporaneous construction not only of the Courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is controlling". (Citing cases.)

Particularly the Courts are reluctant to overthrow a long-followed executive construction of a statute where to do so would work injustice and be inequitable.

59 C.J. 1029, Sec. 609.

As was said in the *Town of Amherst v. Erie County,* 238 N.Y.S. 76, 79:

> "In case of doubt or ambiguity, in the law it is a well known rule that the practical construction that has been given to a law be those charged with the duty of enforcing it, as well as those for whose benefit it was passed, *takes on almost the force of judicial interpretation." McCarthy v. Woolston,* 210 App. Div. 152, 205 N.Y.S. 507;

Bullock v. Cooley, 225 N.Y. 566, 122, N.E. 630; *Grummer v. Tenement House etc.,* 205 N.Y. 549, 98 N.E. 332; *Easton v. Pickersgill,* 55 N.Y. 310; *People v. Charbineau,* 115 N.Y. 433, 22 N.Y. 271; *In re Washington St. A. & P. R. Co.,* 115 N.Y. 442, 22 N.E. 356.

> *"The rule is invoked, not on the theory that common usage can overcome the plainly expressed intention of the legislature, but on the theory that the legislature is deemed to be aware of notorious customs, and that its failure to interfere with them indicates legislative approval and acquiescence."*

Again we repeat that it is very clear that the Acts of Congress relating to the insane in Alaska plainly shows that the monies appropriated by Congress in performance of a governmental function were intended as a gratuity and charity with no thought that the insane person that would be benefited thereby should be compelled to reimburse the government for what it had expended on him.

There is no doubt that the Secretary of the Interior and other government agencies charged with the duty of executing the law, were, up until October 14, 1942, of the same opinion. This is evident from the fact that the first demand, made on August 12, 1944, by the Secretary of the Interior upon George Gartner, was for the sum of $9,180.00, and *was based on the Act of October 14, 1942.* It was the Government's contention that that Act was retroactive (Appendix, p. 1); and it was not until this action that the Government advanced the theory of a Com-

mon Law liability. The Common Law is founded on use and if use is the foundation of the Common Law, it is fair to infer its repeal by long and continued disuse.

12 C.J. 202, Sec. 35.

In *Neal v. Farmer,* 9 Ga. 555, 565, the Court said:

> "Where the subjects or persons upon which a rule of the Common Law operates, have long ceased—where the records of the Courts for many years exhibit no action under it, *it may be, and it would seem ought to be,* held as obsolete, and disregarded by Judges. It is a familiar principle that the reason of the law ceasing, the law itself ceases".

See also 12 C.J. 178, Sec. 5.

RIGHT OF PUBLIC AUTHORITIES TO REIMBURSEMENT AT COMMON LAW.

It is a matter of grave doubt as to whether the public authorities are entitled to recover from insane persons or their estates, the reasonable cost of their care and support at Common Law.

This doubt, in view of the rule, that

> "In case of doubt * * * the practical construction that has been given to a law by those charged with the duty of enforcing it, as well as those for whose benefit it was passed, takes on almost the force of judicial interpretation", *Amherst v. Erie County,* supra.

should be resolved against the government.

WEIGHT OF AUTHORITIES AGAINST RECOVERY.

In 32 C.J. 687, Sec. 374, it is said:

> "While there is some dicta to the effect that, under the Common Law, the estate of a lunatic was liable for his maintenance at public expense * * * it is generally held that at Common Law and in the absence of express contract or deception as to the ability to support himself, *the public authorities may not recover from the lunatic or his estate the expenses incurred on his account,* * * *".

In 44 C.J.S. 175, Sec. 75, the word "dicta" in the above quotation has been changed to "authority", otherwise the text remains the same.

In *Brown's Committee v. Western State Hospital,* 110 Va. 321, 66 S.E. 48 (1909), it is said:

> "It seems not to be controverted that no such right existed at Common Law, in the absence of an express contract, but that the right of action against the estate of a lunatic for past expenses incurred in supporting him in one of the state hospitals can only exist by statute imposing a personal liability for such support."

In *State v. Colligan,* 128 Iowa 536, 104 N.W. 905, it is said:

> "The contention upon behalf of the State is that the estate of an insane person is liable for the necessary expenses of his support. Conceding this legal proposition we find no authority for holding that the State, having established hospitals for the insane, which are largely charities, and provided, in the interest of humanity and for

the protection of society, that insane persons shall be confined therein, *has any Common Law right of recovery against those who have received the benefits of such public charities.* The uniform rule seems to be that there is no liability upon the part of the person who receives such benefits, or on the part of his relatives, *to make compensation save as such compensation may be expressly required and provided for by statute. No such obligation is implied.* Delaware Co. v. McDonald, 46 Iowa 170; Montgomery Co. v. Gupton, 139 Mo. 303, 39 S.W. 47, 40 S.W. 1094".

See also *Baker v. District of Columbia,* 39 App. 42.

In *Wiseman v. State* (Tex. Civ. App. 1936), 94 S.W. (2d) 265, 266, it is said:

"This Court has reached the conclusion that the right of the State to reimbursement for care and maintenance of demented persons did not exist at Common Law, and that State's right and remedy therefor existed and has ever existed by reason only of the Statutes enacted for that purpose. 32 C.J. 686, Sec. 373, 374; 14 R.C.L. 566, Sec. 18".

In *Baldwin v. Douglas,* 37 Neb. 283, 55 N.W. 875, the Court said:

(877) "As is said in Delaware County v. McDonald, 46 Iowa 171: 'The State reaches out its strong arm, and makes the insane its wards, regardless of the care which they may receive at home or the wishes of those upon whom they are dependent for their support * * *. The State

asserts its right for the reason an insane person may often need more than mere maintenance. He often needs restraint, confinement, medical attendance, and peculiar care and treatment. Society is entitled to be protected and relieved against him, and when this is so the State very properly takes charge of him and makes him its ward. *We know of no principle of equity or justice that under these circumstances would imply a contract by the husband to answer for the treatment of his wife furnished by the State in the interests of the general public".*

The support of the insane of Alaska is made a charge on the public and they are by law given a right to their maintenance. Relief to them is nowhere styled a loan or advance nor has repayment ever been contemplated by any law.

Goodale v. Laurence, 88 N.Y. 513;
Alna v. Plumer, 4 Me. 258;
Templeton v. Stratton, 128 Mass. 137;
Alger v. Miller, 5 Barb. 227;
Poplin v. Hawks, 8 N.H. 305.

The law raises no implied obligation on the part of one received into a charitable institution for support or treatment to pay therefor in the absence of a contract. Such relief is referred to motives of charity unless the laws otherwise provide that compensation may and shall be demanded.

Commissioners of Montgomery County v. Ristine, 124 Ind. 242, 24 N.E. 990;
Deer Isle v. Eaton, 12 Mass. 328;
Medford v. Learned, 12 Mass. 215.

ERRORS COMMITTED AT THE TRIAL.

ASSIGNMENT OF ERRORS.

"Assignment V. (R. 98.) The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objection of Defendants, as follows:

Q. Are you acquainted with George Gartner?

A. Yes.

Q. How long have you known him?

A. I have known George since July, 1936.

Q. Now, Dr. Haskins, I would like to have you state to the jury what, in your opinion, was the reasonable value of the care and maintenance provided Mr. George Gartner at Morningside Hospital, on a monthly basis, per month during 1927?

Mr. Clasby: To which we object, if the Court please, for several reasons. The first, this witness was not present at the hospital in 1927 and has no personal knowledge of the services that were then performed for George Gartner. This witness was not then a member of the staff of the Sanitarium Company and has no knowledge of what it cost the Sanitarium Company to supply those services or what the reasonable value of those services were. This witness has further testified that at that time he was in New York—or, no—he was in the general practice of medicine. He was not even connected with psychiatry or had any knowledge of hospitals for insane patients.

The Court: Objection overruled.

A. About $52.00 a month.

Assignment VI. (R. 99.) The Court erred in permitting John LeRoy Haskins, a witness called

on behalf of Plaintiff, to testify over the objection of Defendants, as follows:

Q. Will you give us your answer to the same question for the year 1928?

Mr. Clasby: Just a moment. To which we interpose the same objection, if the Court please. The witness' testimony shows in 1928 he was in private practice; he had no familiarity with this institution or this patient or costs at psychiatric institutions. It hasn't been shown that he has any records or information available to him from which to form an opinion as to the cost in 1928, the same as our objection to the year 1927. There is other and better evidence that can be produced to establish that cost, and that is the record of the sanitarium itself.

The Court: Objection overruled.

A. $52.00 a month.

Assignment VII. (R. 100.) The Court erred in permitting John LeRoy Haskins, a witness called on behalf of Plaintiff, to testify over the objections of Defendants as follows:

Q. And will you answer the question with reference to the year 1929?

A. $52.00 a month.

Mr. Clasby: We, if the Court please, would like to have the record show an objection to all questions of this kind up to the year 1936.

The Court: Very well, the same ruling to the objections.

Q. For 1930?

A. 1930. At that time food prices were somewhat lower.

Mr. Clasby: We object to comments by the witness.

Mr. Arend: Yes. You can just state—

A. (Interposing) $47.00.

Q. 1931?	A. $47.00.	Q. 1934?	A. $47.00.
Q. 1932?	A. $47.00.	Q. 1935?	A. $47.00
Q. 1933?	A. $47.00.	Q. 1936?	A. $50.00.

Assignment VIII. (R. 101, 102.) The Court erred in refusing to strike the testimony of Plaintiff's witness John LeRoy Haskins as to the reasonable value of Plaintiff's services to the Defendant George Gartner for the reason that said testimony was based entirely upon the contract price between the Plaintiff and the Sanitarium Company, the proceeding in relation thereto being as follows:

Q. On what do you base that?

A. Well, I base it on reports which we have from the United States Public Health Service and the physician, who was on duty at the institution at that time.

Q. What did he base it on?

A. He based it on what he believed to be adequate care of the patient. They were getting adequate care, and an investigation had shown that that was about equivalent with the care in other hospitals of the same type.

Q. You, at that time, had no knowledge of the care that was given to George Gartner?

A. I am going on his notes, his clinic records, and his observations which are in the hospital now, and his reports to the department covering those periods.

Q. Well, aren't you largely going on the contract price?

A. If the contract price was a fair—If the contract price was a fair price, and it was, that was the adequate care.

Q. If I recall your testimony properly, Doctor, your testimony coincides exactly with the contract price?

A. Well—

Q. Isn't that correct?

A. Yes, we believe that—

Q. (Interposing): Now, wait a minute, And that your testimony as to when the reasonable value of the services rendered George Gartner varied, why the contract varied too?

A. Yes.

Q. *Now I ask you, isn't your testimony based entirely upon the contract price?*

A. *What else would it be based on?*

Mr. Clasby: Well, on that basis, if the Court please, we move that this testimony be stricken for the reason that he has admitted it is based on the contract price.

Assignment IX. (R. 102.) The Court erred in admitting, over objection by the Defendants, the contract price for per capita care of patients at Morningside Hospital during the years 1927 to 1942; agreed upon between the Plaintiff and the Sanatarium Company, the proceedings relating thereto being as follows:

Mr. Arend: If the Court please, at this time we ask permission to read the stipulation to the jury.

The Court: Very well.

Mr. Clasby: We object to the stipulation being admitted in evidence upon the grounds and for the reason that the contract price as therein stipulated is not proper evidence to be submitted in a proceeding of this kind and has no tendency to prove any of the issues.

The Court: Objection overruled."

This stipulation (Pl. Ex. A, R. 72-74), entered into between the attorneys is in substance that the contract prices agreed to between the United States and the Sanitarium Company for the care, custody, medical treatment and maintenance of the insane patients at Morningside during various five-year periods, were as follows:

January 1925, five years @ $52.00 per month, per patient;

January 1930, five years @ $47.00 per month, per patient;

January 1935, one year @ $47.00 per month, per patient;

January 1936, one year @ $50.00 per month, per patient;

January 1938, five years @ $54.00 per month, per patient.

The trial of this case discloses a flagrant violation of the legal and constitutional rights of the defendants. The trial was had before the Court and a jury. The issue involved was "the reasonable cost of the care and maintenance of the defendant, George Gartner", at Morningside Hospital from August 10, 1927, to October 13, 1942 (Complaint, R. 3, 4), a period of more than sixteen years, during all of which time no claim or demand was made on behalf of the United States, or any agency thereof, that Gartner was indebted to the United States in any sum whatsoever for his care and keep at Morningside.

The judgment is for the sum of $9,180.11, with interest at the rate of 6% per annum, together with costs in the sum of $83.00. (R. 29.) The judgment was rendered upon a verdict directed by the District Judge upon his own suggestion. (R. 86, 87.) The verdict has not a scintilla of evidence to support it. It is based entirely on the *opinion* of Dr. John LeRoy Haskins, a psychiatrist, to the effect that the per month per capita contract price agreed to by the United States and the Sanitarium Company for the care and maintenance furnished Gartner at Morningside during the period involved was the reasonable value thereof.

The witness testified that the Sanitarium Corporation did not keep separate accounts for individual patients, and that "they just bulk all of them". (R. 57.) Also that different patients need different treatment, his testimony in this respect being, "You get one patient who might need a lot of hospitalization, and need infirmary nursing all of the time; another might need little. You got to bulk them". (R. 57.) Gartner was one of the patients that "need little".

Gartner's clinical record shows "that his is a case of dementia præcox and that while he is a good contact, knows people, knows where he is, his age, and all those details, he is a delusional patient. (R. 51.) That the clinic record shows that about five years ago he developed a cardiac condition. (R. 52.) (This is subsequent to the period here involved. (That prior to that time the clinic record shows no physical ailment—nothing striking in his physical case. (R. 52.)

That he could do *duties* around the garden, barns, etc. The record shows that at one time he helped in the kitchen and dining room. That only 15 to 20% of the average 365 patients at the hospital were permitted to perform functions in the dining room, garden, or in the hospital industry. (R. 54, 55.) Gartner was one of the 15 to 20%.

NECESSARIES AND SERVICES FURNISHED GARTNER.

The evidence shows that under the contracts with the government the Sanitarium Company was to provide everything for the patients. Food, wearing apparel, medical supplies, dental work, recreational facilities, and sleeping quarters.

The normal and usual way to prove the reasonable value of the necessaries furnished and services rendered is to show, (1) what the items of the necessities furnished and services rendered were; (2) their kind, quantity, and quality; (3) the reasonable cost of each item. Competent evidence of these facts would enable the jury to render a just and fair verdict. No such evidence was offered in this case. Not a word of testimony was given as to any item of necessaries furnished, or of services rendered, and this being so, no evidence could or was given as to the kind, quantity, or quality of the items furnished or their reasonable value.

Instead the government sought to prove the reasonable value by introducing, over the objections of

defendants, the contract price per patient per month entered into between the Company and the government. This testimony being admitted, the witness testified that the contract prices were the reasonable value for the care and treatment furnished Gartner while committed at Morningside.

The culmination of the witness's testimony is summed up in the following question and answer:

> "Q. Now I ask, isn't your testimony based entirely on the contract price?
>
> A. What else would it be based on?"

We submit that the opinion of John LeRoy Haskins was immaterial and incompetent. It was immaterial because *this is not a case calling for expert or opinion testimony.* It was for the jury, upon competent and material evidence being introduced, to determine the issue of its reasonable value. The opinion of the witness invaded the province of the jury. *It was an error to admit it in evidence.*

THE COURT ERRED IN DENYING APPELLANTS' OFFER TO SHOW THAT THERE WERE NO PROFITS IN THE GARTNER CASE.

ASSIGNMENT OF ERROR.

> "Assignment XII. (R. 108.) The Court erred in refusing to permit the Defendant, Mike Erceg, as guardian of the Estate of George Gartner, an insane person, to testify as to the property of said George Gartner and the lack of profits therefrom, the proceedings relating thereto being as follows:

Q. Mr. Erceg, would you tell us what property George Gartner had when you assumed control of his estate?

Mr. Arend: If the Court please, we object to this testimony as irrelevant and immaterial. Whether or not he had property is not relevant and material to the issues in this case.

The Court: Objection sustained.

Q. Does George Gartner's estate now have any assets that represents income from the property that you have administered in this estate?

A. No.

Mr. Arend: We object to that question on the same grounds as the preceding question.

The Court: Objection sustained.

Mr. Clasby: We offer to prove by this witness, if he were permitted to testify, that * * * there has been no profits over and above the necessary expenses of preserving the property of this estate during the time that it has been administered by the guardian.

Mr. Arend: We object to all of the testimony as irrelevant and immaterial under the issues of this case.

The Court: Objection sustained."

In support of this assignment of error we here adopt the argument and authorities cited by us in support of subdivision (a) Assignment of Error I, Ante page 6.

The Court erred in directing a verdict for the Government.

ASSIGNMENT OF ERROR XV. (R. 113.)

"The Court erred in directing a verdict for the Plaintiff, and in receiving and filing such verdict as being contrary to the law and the evidence, the proceedings relating thereto being as follows:

The Court: Well, you are not making a motion for a directed verdict?

Mr. Arend: Well, your Honor, we move the Court for a directed verdict in this case, directing the jury to bring in a verdict in line with the values established by the government's witness, Dr. Haskins * * *.

Mr. Clasby: May it please the Court, * * * We have offered what we think is a question for the jury, and that is that this man was not a patient that required a great deal of care and attention and that he could perform services, and the evidence shows that the price testified to is a per capita average cost, and we believe this jury is entitled to, under the evidence and the law, have submitted to them the question of whether or not that price is what the value of these particular services rendered to George Gartner was; and on that theory we resist counsel's motion for a directed verdict."

As heretofore stated, the only evidence before the Court was the evidence of Dr. Haskins, the psychiatrist, that his opinion was based entirely upon the contract price. Solely upon this evidence the Court instructed a verdict for the plaintiff. This was error.

In *Doernbecher Mfg. Co. v. Commissioner of Internal Revenue,* 95 Fed. (2d) 296, this Court, in de-

termining whether salaries paid officers of the corporation exceeded the value of services rendered, held that the corporation could only deduct the amount found to be the reasonable value of the services rendered, in computing taxable income. This Court held that the opinions must be based upon evidence; and that the Tax Board was not bound by the testimony of experts, and said:

> "In determining a reasonable allowance for such services, the Board of Tax Appeals may exercise its own independent judgment. Its power is similar to that of a jury required to determine such value. As early as Head v. Hargrave, 105 U.S. 45, 49, 26 L. Ed. 1028, the Supreme Court, speaking through Mr. Justice Field, said: 'It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience, and knowledge of the character of such services. * * * The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts mate-

rial to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry'. This rule was followed in Forsyth v. Doolittle, 120 U.S. 73, 7 S. Ct. 408, 30 L. Ed. 586, and in The Conqueror, 166 U.S. 110, 132, 17 S. Ct. 510, 41 L. Ed. 937.

The rule has been recently stated in an opinion by Judge Sanborn, speaking for the Circuit Court of Appeals for the Eight Circuit in U.S. v. Washington Dehydrated Food Co., 89 F. (2d) 606, 609; by this court, speaking through Judge Haney, in Buck v. Com'r, 83 F. (2d) 786; and by Justice Cardozo, speaking for the Supreme Court, in Dayton Power & Lt. Co. v. Public Utilities Com'r, 292 U.S. 290, 299, 54 S. Ct. 647, 652, 78 L. Ed. 1267, where he said: 'But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury (citing cases) or to a judge (citing cases), or to a statutory board (citing cases).' "

The rule has been stated "that if the Court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony". *Spring Co. v. Edgar,* 99 U.S. 658, 22 C. J. 728, Sec. 823.

Wherefore Appellants pray that the Judgment of the District Court be reversed.

Dated, Fairbanks, Alaska,
August 15, 1947.

Respectfully submitted,
JOHN L. McGINN,
COLLINS & CLASBY,
By CHAS. J. CLASBY,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

1-480

Defdt. Identification
A
..... Exhibit .....
U. S. A.

Plaintiff,

vs.

Gartner et al.,

Defendant.

No. 5368.

United States of America

* * *

Department of the Interior,
Washington, D. C.

August 31, 1944.

Pursuant to Title 28, Paragraph 661, United States Code, I hereby certify that the annexed photostat is a true copy of the original Administrative Finding and Order of the Secretary of the Interior dated August 12, 1944, regarding payment for the care and treatment of George Gartner at Morningside Hospital, Portland, Oregon, as such document appears in the records and files of this Department.

In Testimony Whereof, I have hereunto subscribed my name, and caused the seal (Seal) of the Department of the Interior to be affixed, the day and year first above written.

(s) Abe Fortas,
Under Secretary of the Interior.

United States
Department of the Interior
Office of the Secretary
Washington

George Gartner,
an insane resident
of Alaska.

Finding as to ability to pay for care and treatment at Morningside Hospital.

ADMINISTRATIVE FINDING
AND ORDER
* * *

WHEREAS, By virtue of the act of Congress entitled "An Act to amend the law relating to the care and custody of insane residents of Alaska, and for other purposes," approved October 14, 1942 (56 Stat. 782), the duty is imposed upon a resident of Alaska who has been legally adjudged insane and committed to a mental institution, or his legal representative, spouse, parents or adult children, to pay or contribute to the payment of the charges for the care and treatment of such patient in such manner and proportion as the Secretary of the Interior may find to be within their ability to pay; and

WHEREAS, George Gartner, a resident of Alaska, was on or about August 1, 1927, duly adjudged insane and committed to Morningside Hospital of Portland, Oregon, a mental institution under contract with the Department of the Interior for the care, treatment and custody of the Alaska insane, where he has been

confined from August 10, 1927, continuously to the present time; and

WHEREAS, the actual cost of the care and treatment of the said George Gartner from August 10, 1927 to July 1, 1944, was the sum of $10,502.70, and that pursuant to Article 10 of the agreement dated November 10, 1942, between the Department of the Interior and the Morningside Hospital, the cost subject to modification as reflected by the United States Department of Labor cost-of-living index, will continue to be at the rate of $70 per month; and

WHEREAS, It appears that Mike Erceg of Fairbanks, Alaska, was, by order of the United States Commissioner, Fairbanks Precinct, dated on or about August 1, 1927, duly appointed guardian of the estate of said George Gartner and is still acting as such guardian and that the assets of the said estate amount to $9,986.10 and a patented mining claim.

NOW, THEREFORE, I do hereby find and determine as follows:

1. That the sum of $10,502.70, representing the cost of the care and treatment of said George Gartner at Morningside Hospital from August 10, 1927, to July 1, 1944, said George Gartner or Mike Erceg of Fairbanks, Alaska, as his guardian, is able to pay the sum of $9,000;

2. That for the future care and treatment of the said George Gartner at Morningside Hospital, said George Gartner or Mike Erceg of Fairbanks, Alaska, as his guardian is able to and shall pay the sum of $50 per month;

3. That neither this order nor payments made in compliance therewith shall constitute either determination of the amount or payment in full of the claim of the United States for reimbursement for the cost of the care and maintenance of said George Gartner at Morningside Hospital and the right of the Secretary of the Interior to modify, amend or revoke this order is hereby reserved.

(s) HAROLD L. ICKES,
Secretary of the Interior.

August 12, 1944.

Certified Copy.

Fourth Division District of Alaska
United States of America } *ss:*

I, John B. Hall, Clerk of the United States District Court in and for the Fourth Division District of Alaska, do hereby certify that the annexed and foregoing is a true and full copy of the photostat entered in Cause No. 5368, entitled United States of America, Plaintiff, versus George Gartner, et al, Defendants, as Defendant's Identification "A", now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal (Seal) of the aforesaid Court at Fairbanks, Alaska, this 31st day of July, A.D., 1947.

John B. Hall,
Clerk.

By Olga T. Steger,
Deputy Clerk.